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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

COOK INLET REGION, INC.

June 14, 1995

BY HAND DELIVERY

The Honorable Reed E. Hundt
Chairman, Federal Communications
Commission
1919 M Street, NW
Washington, DC 20554

Re: Amendments to the Commission's Broadband PCS
Entrepreneurs' Block Auction Rules

Dear Chairman Hundt:

Cook Inlet Region, Inc. ("CIRI") is pleased to submit the following comments on the Commission's entrepreneurs' block auction rules in the wake of the Supreme Court's decision Monday in Adarand Constructors, Inc. v. Peña.

CIRI believes that the Commission can fulfill in large measure its statutory obligations to ensure broad participation in the provision of spectrum based services while taking into account the limitations on the use of minority preferences established in Monday's Supreme Court ruling. CIRI encourages the Commission to retain and enhance its entrepreneurs' block rules and policies as they apply to entrepreneurial and small entities and to withdraw any preferences based on race or gender. By acting quickly, the Commission will encourage participation in its auctions by all small entities regardless of their racial or gender composition. The Commission also will eliminate the uncertainty that now clouds the future of many C block auction applicants.

As a threshold matter, the Commission should retain and enhance its entrepreneurs' block rules as they apply to entrepreneurial and small entities. It is well-established that there is no constitutional limitation on the use of financial categories to distinguish between classes of entities. Indeed, the entrepreneurs' block and small business policies established by the Commission in its spectrum auction proceeding are effective, constitutionally sound tools with which to encourage investment in entrepreneurial entities. By reserving spectrum blocks C and F for bidding by relatively small companies and retaining the 25 percent equity exception for small businesses,

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the Commission will open the telecommunications field to a host of entities that otherwise would be excluded.

CIRI supports the Commission's goal of preserving an early auction date, which will speed the availability of PCS to the public. Because the applications that will soon be filed reflect many months of negotiation and effort by the applicants, however, retention of an early auction date will be feasible only if the Commission imposes minimal changes on the economic assumptions upon which the applications are predicated. In that regard, when the Commission reconfigures its entrepreneurs' block rules, the Commission also should enhance the preferences available to small businesses to encourage investment in these entrepreneurial entities. Such enhancements include:

- 1) extending the 49.9 percent equity exception to small businesses;
- 2) increasing the bidding credit available to small businesses from 10 to 25 percent; and
- 3) offering to small businesses the most favorable payment terms now available.

With these improvements, the Commission will assist many small businesses in attracting the capital necessary to obtain a broadband PCS license. The Commission will effectively encourage the participation of a broad cross-section of potential bidders without regard to race and without implicating the Supreme Court's decision in Adarand Constructors. Moreover, many of the same bidders now preparing C block applications will remain eligible to bid in the reconfigured entrepreneurs' block auctions. Most small businesses will be able to avoid the costly and time-consuming process of renegotiating existing business arrangements and pending and consummated alliances will remain intact.

In the context of retaining its entrepreneurs' block rules and establishing enhanced preferences for small businesses, the Commission must be careful to retain its tribal affiliation exemption adopted for the small business category. As the Commission established in its Fifth Memorandum Opinion and Order in the spectrum auction proceeding, "[W]e exempt Indian tribes generally from our affiliation rules because Congress has imposed unique legal constraints on the way they can utilize their revenues and assets." Implementation of Section 309(f) of the

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Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 427 (1994). Indeed, the Commission detailed several of these unique legal constraints, including the inability of Alaskan Natives to pledge stock in the Regional Corporation against ordinary borrowings and the inability of the Corporation to issue new stock or debt securities. *Id.* at 427-28. These limitations render CIRI's Alaskan Native shareholders unable to utilize their assets to participate in the Commission's auctions as individual small businesses. *Id.* at 428.

Recognizing these financial limitations and the plain congressional policy regarding Native American small business affiliation, the Commission determined that Alaska Native Regional Corporations should be excluded from the affiliation coverage of applicants that they own and control. Indeed, the Commission exempted these Corporations from affiliation specifically for the purposes of the Commission's small business size definitions. For the same reasons articulated by the Commission in its spectrum auction proceeding, the tribal affiliation rules set forth in Section 24.720(1)(11)(i) of the Commission's Rules should apply in the context of the Commission's new small business entrepreneurs' block preferences.

The constitutional basis for the unique treatment of Indian tribes and Alaskan Native Regional Corporations cannot seriously be challenged, nor has it been called into question by Adarand. As Justice Stevens noted in his opinion, the Supreme Court has long recognized that the special treatment of these entities by Congress is not based on race at all. It is based on the unique political relationship that exists between Native Americans and the United States government under Article I, Section 8 of the Constitution. See Adarand Constructors, J. Stevens Dissenting, at 4 and n.3. The majority of the Court did not and could not disagree with this proposition.

Indeed, as then-Judge Scalia explained when writing for the majority of the United States Court of Appeals for the District of Columbia Circuit, "[T]he Constitution itself . . . singles Indians out as a proper subject for separate legislation." United States v. Cohen, 733 F.2d 128, 139 (D.C. Cir. 1984) (*en banc*) (internal quotations omitted). Thus, preferences accorded to these entities simply are not subject to "[t]raditional equal protection analysis," regardless of the standard of review. United States v. Decker, 600 F.2d 733, 740 (9th Cir. 1979). Accord Morton v. Mancari, 417 U.S. 535 (1974). Courts routinely

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recognize that Indian tribes and similar groups are subject to special rules, see e.g., Oklahoma Tax Com'n v. Potawatomi Indian Tribe, 111 S.Ct. 905, 909-10 (1991) (holding that Indian tribes are immune from suits by states), and to special federal regulation. See, e.g., Chugach Alaska Corp. v. Lujan, 915 F.2d 454 (9th Cir. 1990) (affirming regulation of the membership of an Alaskan village by the Secretary of the Interior).

The treatment accorded to Native American entities in the Commission's affiliation rules is based on a clear congressional policy and the unique status Native Americans under the Constitution. The special status accorded to these entities is not grounded in race and is not affected by the Adarand decision. For these reasons, the tribal affiliation rules set forth in Section 24.720(1)(11)(i) of the Commission's Rules should apply in the context of the Commission's new small business entrepreneurs' block preferences.

In summary, as the Commission undertakes to reconfigure its entrepreneurs' block auction rules, it should consider the effect of the new rules on potential C block applicants and ways to avoid large-scale disruption of existing strategic partnerships. Toward that end, the Commission should continue to reserve spectrum blocks C and F for bidding by relatively small companies and retain the 25 percent equity exception for small businesses. Next, the Commission should preserve the fundamental economic assumptions underlying many of the already completed C block applications by enhancing the preferences available to small businesses. Finally, the Commission should take great care to ensure that the unique, non-race oriented tribal affiliation exemption is not swept away in the post-Adarand storm.

Sincerely,

COOK INLET REGION, INC.


Roy M. Huhndorf
President

cc: The Honorable James H. Quello
The Honorable Andrew C. Barrett
The Honorable Rachelle D. Chong
The Honorable Susan Ness